

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
G.S., a minor under the age of 18, :
by her father and natural :
guardian, Morris S., :
: 15-CV-3086 (ARR)
Plaintiff, :
: January 29, 2016
v. :
: Brooklyn, New York
CONGREGATION LEV BAIS YAAKOV, :
et al., :
:
Defendants. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ROBERT JOSEPH TOLCHIN, ESQ.
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Brooklyn, New York 11201

For the Defendants: DAVID SCOTT RUTHERFORD, ESQ.
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1 (Proceedings began at 2:05 p.m.)

2 THE CLERK: Civil Cause for Telephone Conference,
3 Docket No. 2015-CV-3086, G.S. v. Congregation Lev Bais Yaakov.

4 Counsel for plaintiff, please state your name for
5 the record.

6 MR. TOLCHIN: Robert Tolchin, T-O-L-C-H-I-N, Berkman
7 Law Office, 111 Livingston Street, Brooklyn, New York.

8 THE CLERK: Counsel for the defendant, please state
9 your name for the record.

10 MR. RUTHERFORD: David Rutherford, Rutherford &
11 Christie for the defendants.

12 THE CLERK: Magistrate Judge Reyes.

13 THE COURT: Good afternoon, gentlemen.

14 MR. TOLCHIN: Good afternoon, Your Honor.

15 THE COURT: What is it that the defendants want?

16 MR. RUTHERFORD: We want an authorization for the
17 cell phone records of the plaintiff.

18 THE COURT: Mr. Tolchin indicated in one of the
19 letters that he wrote that you wanted a little more, you
20 wanted everyone in the family or something like that.

21 MR. RUTHERFORD: I'm really concerned with the
22 infant plaintiff's records. The reason the request is phrased
23 such as it is is it may be on a family plan in the father's --
24 in the father's name. I'm really not interested in the
25 parents records. I'm just interested in getting to the girl's

1 records and I just thought that because it might be a family
2 plan that was the way to go about it.

3 THE COURT: What is it that you hope to get on the
4 records?

5 MR. RUTHERFORD: Well, as Your Honor will recall,
6 this is a case about an alleged inappropriate picture that was
7 sent electronically and found on another boy's phone. The
8 plaintiff denies having sent that and then had destroyed the
9 telephone and can't remember her number or the carrier. And
10 so we want to find -- we want the records. We believe that
11 the text records will help us to try and undermine that
12 statement.

13 MR. TOLCHIN: I'm sorry.

14 THE COURT: Mr. Tolchin, you'll get a chance.

15 MR. TOLCHIN: No, no, no. I just thought that we
16 got cut off.

17 THE COURT: No, no, no. I'm here. I'm just
18 thinking. I'm just wondering whether text records are going
19 to get you what you think is [inaudible].

20 MR. RUTHERFORD: They may. Unfortunately like Tom
21 Brady, the phone was destroyed. So if we had the phone we
22 could have someone go in and see what's in the phone but
23 that's not available to us any more.

24 THE COURT: What are the text records going to
25 indicate?

1 MR. RUTHERFORD: The fact that there's a very
2 limited number of boys who this plaintiff would have been
3 texting and if somehow a boy came in possession of a naked or
4 a half naked picture of the plaintiff. Now, he says he got it
5 from another boy. So what I'm hoping to show is text from a
6 boy and then run down with that boy whether he received and
7 take such a picture and in fact --

8 THE COURT: Let me ask you something. How are you
9 going to find out the gender or the identity from text
10 records?

11 MR. RUTHERFORD: This is a very -- a couple of --
12 there's a couple of ways but [inaudible]. This is a very
13 close knit community where everybody -- it's an Orthodox
14 community where everybody knows everything about everybody
15 else. In fact, Mr. Tolchin told me some things about my own
16 clients before I heard about it. One of my client's relatives
17 died. He knew that before I knew it. So I think that my
18 client is going to be able to eliminate most if not all of
19 these phone numbers and narrow it down to a very few people
20 which we'll be able to figure out by checking with other
21 people in the community or other children and seeing if we can
22 identify who the boys are.

23 I don't think [inaudible] contact every single
24 person on the call list although I don't think -- if this
25 plaintiff is like my children they don't call very many

1 people. So I'm hoping to run it down that way. I've been
2 hampered because I don't have access to the phone which was
3 thrown out.

4 THE COURT: Thrown out pre-lawsuit?

5 MR. RUTHERFORD: [Inaudible] pre-lawsuit but after
6 all these events and certainly after the importance of it. I
7 mean I'll probably have a spoliation motion at some point but
8 that --

9 THE COURT: I don't know about that if it was thrown
10 out pre-lawsuit.

11 MR. RUTHERFORD: That can be debated in another
12 forum. I'm not here to debate spoliation. I think given the
13 broad nature of discovery and given the fact that the phone is
14 no longer available I'm using the next best thing [inaudible -
15 coughing]. It's not -- my client is [inaudible] which caused
16 it. It's the throwing out of the phone which caused it.

17 THE COURT: But let's go back to the phone records.
18 So you'll get -- you'll get who she was -- the telephone
19 numbers that she was in contact with whether by telephone
20 call, [inaudible] call or text.

21 MR. RUTHERFORD: Right. And I'm most concerned
22 about the texts.

23 THE COURT: Will you get whether, from those records
24 whether there was an attachment to the text or whether it
25 was --

1 MR. RUTHERFORD: Yes, yes. That's what typically
2 accompanies it, is a picture next to it.

3 THE COURT: How do you know that?

4 MR. RUTHERFORD: Because I've seen them before in
5 other cases.

6 THE COURT: They don't even know the carrier that
7 they were using at the time?

8 MR. RUTHERFORD: Or her number believe it or not.

9 MR. TOLCHIN: Your Honor, if I [inaudible]
10 interject.

11 THE COURT: [Inaudible] don't know the carrier or
12 the number what -- how are you going to get any records?

13 MR. RUTHERFORD: There are not that many telephone
14 carriers out there but we can send them to all the cell phone
15 carriers.

16 THE COURT: But without a telephone number --

17 MR. RUTHERFORD: Frankly, Your Honor --

18 MR. TOLCHIN: I can answer that directly.

19 THE COURT: Mr. Tolchin, you'll get a chance. Just
20 hold off.

21 MR. RUTHERFORD: Frankly, Your Honor, I find it
22 incredulous that they can't remember who the carrier is from
23 2013 and I think faced with a court order we'll get it an
24 authorization. I mean I think what's going on is they're
25 hiding the evidence. I mean who doesn't -- the phone is

1 thrown out, I don't remember my phone number, I don't remember
2 the carrier. Are you kidding me? That's not plausible and
3 this is a blatant attempt to avoid production of discovery.

4 THE COURT: Mr. Tolchin, why don't you tell me what
5 your argument --

6 MR. TOLCHIN: First of all, what I was trying to
7 correct is that although at the deposition, at the time of the
8 deposition they both testified, the father and daughter, that
9 they did not recall the phone number or the carrier. Since
10 this issue was raised with the Court I actually did run it
11 down and you'll see in my letter to the Court [inaudible] the
12 way I ran it down was I pushed my clients to say well, which
13 carriers could it have been and let's call the carriers and
14 ask did I have an account. So I figured it out. One is AT&T.
15 I even know the phone number. So if it comes to it know the
16 girl's phone number. She didn't know it at the deposition but
17 we got it from AT&T.

18 So in terms of accusations of hiding the ball or
19 varying evidence that really is unappreciated particularly
20 since in my letter to the Court I stated it was AT&T so what
21 am I hiding.

22 MR. RUTHERFORD: I'm not accusing you, Mr. Tolchin,
23 of hiding it. I'm talking about your client.

24 MR. TOLCHIN: Your Honor, I think defense counsel
25 should have been a little more forthright with the Court on

1 that. So I'll leave that alone.

2 What counsel is saying is that he wants to take my
3 client's phone bill or phone record obtained from -- get an
4 authorization or a subpoena on AT&T. In his demand he wants
5 to do this from 2012 to the present. So I don't know what
6 [inaudible] matters. I don't know why that is being
7 requested.

8 MR. RUTHERFORD: I don't need that. If that says
9 that I will correct that.

10 MR. TOLCHIN: I brought that up in my letters. I
11 don't know why that's --

12 MR. RUTHERFORD: We can down that road, why did you
13 serve that?

14 MR. RUTHERFORD: I didn't serve it. My associate
15 who is not here --

16 THE COURT: Wow, wow. You're blaming it on your
17 associate?

18 MR. TOLCHIN: I'm not blaming anything. You asked
19 why I did that. What I'm saying is --

20 THE COURT: Whether it's your associate or you it's
21 your law firm. Your law firm is of counsel to the defendants.
22 They're all on the hook.

23 MR. RUTHERFORD: Of course we are.

24 THE COURT: Don't tell me that it was my associate,
25 it was my secretary, it was a contract attorney. You're all

1 in it together.

2 MR. RUTHERFORD: I'm not saying we're not, Your
3 Honor. You asked me for why did I do that. I don't have an
4 answer for you.

5 THE COURT: Fine. Why did your firm do it? Over
6 reaching.

7 MR. TOLCHIN: Okay. I raise that --

8 THE COURT: Mr. Tolchin, speak when you're spoken
9 to. I'm not talking to you. I'm talking to Mr. Rutherford.

10 MR. RUTHERFORD: What I'm really thinking is 2012 to
11 November of 2013.

12 THE COURT: When was this supposed picture sent?

13 MR. RUTHERFORD: The call is dated November of '13.
14 So our guess is it was sent some time within the year. So
15 that's why we sought the records starting in November of -- in
16 2012.

17 THE COURT: Let's say she sent it. Your clients
18 have never seen it. They only heard at least second hand that
19 this happened. Let's say she sent it on her own time. So
20 what? Why does that give them the right to [inaudible]?

21 MR. RUTHERFORD: Because it's a violation of the
22 school's policies toward the students.

23 THE COURT: What policy?

24 MR. RUTHERFORD: We're dealing with an Orthodox
25 community and there is an anti technology rule and believe it

1 or not this is a school where when you come to school they
2 take away your cell phones. They're only allowed to have cell
3 phones during -- when they're coming to school for safety
4 reasons. The cell phones are then examined by a technology
5 person because people who go to that school they think that
6 the internet is bad and they don't want people on the
7 internet. They don't want the communication between boys and
8 girls that could lead to things like this. In fact, the
9 plaintiff had been suspended on a prior occasion for violation
10 of the technology rules.

11 THE COURT: What is the technology rule? Where is
12 it written and what does it say?

13 MR. RUTHERFORD: It's written in the student
14 handbook.

15 THE COURT: That has been produced?

16 MR. RUTHERFORD: Yes.

17 THE COURT: Do you have that, Mr. Tolchin?

18 MR. TOLCHIN: Yes.

19 THE COURT: What should it say? What does the
20 technology rule say, you can't ever use a cell phone any time
21 at night when you're home? What does it say?

22 MR. TOLCHIN: Who are you asking, Your Honor?

23 THE COURT: Anyone. I mean you both have it so you
24 both should know what it says. I'm just wondering.

25 MR. TOLCHIN: The rule is more -- it's not against

1 cell phones. It's against smart phones but [inaudible].

2 THE COURT: But they would say that they can't have
3 them on their own time or that they just cannot use them while
4 they're at school?

5 MR. RUTHERFORD: Phones that can go on the internet
6 or --

7 MR. RUTHERFORD: They're not supposed to be --

8 THE COURT: Or phones in general?

9 MR. RUTHERFORD: No, no.

10 THE COURT: Is there a rule -- what [inaudible] says
11 bla, bla, bla, bla, whatever it is. What does it say?

12 MR. TOLCHIN: Because I think that's crucial in this
13 case because if she said whatever she said on her own time and
14 that doesn't violate the rule they had no grounds to expel
15 her.

16 MR. RUTHERFORD: The thing is, Judge, that the -- by
17 their testimony the expulsion was not because of violating the
18 rule of having a phone. Yes, the previous school year she was
19 suspended for being -- because she brought an iPhone to school
20 but that was over and done with it. Everyone would testify
21 that's what the expulsion was because of this alleged episode
22 of sending the picture.

23 THE COURT: Well, what did -- let's assume that she
24 did, how did that violate the school's policy?

25 MR. RUTHERFORD: In the testimony of Mr. Deutsche,

1 the executive director of the school who's the one who made
2 the decision to terminate her, she believes that having a girl
3 who would do such a thing is -- has the danger of his words
4 infecting 160 other girls in her grade or in her school. He's
5 worried about infecting the other kids. So he made a
6 decision. I quoted the testimony. He no idea what the
7 picture was but he believed that his principal that took the
8 call believed this mother that her son said that another boy
9 said that this was the plaintiff. I think that's five layers
10 of hearsay.

11 Do you want to know what the rule is? I can read
12 it.

13 THE COURT: Did he cite to whether there is a rule
14 or not? Did he cite to anything in the student handbook or
15 some other policy of the school that was established at the
16 time that she [inaudible], at his deposition, a written
17 interrogatory, anything? I'm just trying to get a sense
18 because I just want to know why they did this and if it's a
19 valid reason or it was just [inaudible].

20 MR. RUTHERFORD: Well, can read what the rule says,
21 Your Honor.

22 MR. TOLCHIN: [Inaudible]

23 THE COURT: Let Mr. Rutherford read the rule.

24 MR. TOLCHIN: Okay.

25 MR. RUTHERFORD: There's a page of introductory part

1 but the portion we're talking about: As per the use of
2 technology in general both at home and in school please keep
3 the following in mind. Technology can indeed be used as a
4 valuable tool in many instances. However, when it comes to
5 putting a steering wheel in the hands of our youth it is
6 crucial that we do everything plausible to simultaneously
7 safeguard their emotional and spiritual growth. Parents that
8 are -- Bob, you may have to help me with this word. Chad or
9 Shalom --

10 MR. TOLCHIN: God forbid.

11 MR. RUTHERFORD: God forbid not vigilant in this
12 matter making a decision that not only compromises the safety
13 of their daughters but the safety of other classmates and
14 school friends as well. Our collective experience in
15 [inaudible] has shown that these issues will surface rather
16 quickly and it's a ripple effect is outstanding. Ignoring
17 school rules will unfortunately put our school administration
18 in a situation that [inaudible] measures be taken that may
19 ultimately lead to suspension.

20 THE COURT: And she was expelled, not suspended.

21 MR. RUTHERFORD: Well, she was suspended one time
22 and this was the second time.

23 THE COURT: So is there anything in the procedures
24 that say -- that has a progressive discipline policy?

25 MR. TOLCHIN: They have no written procedures but I

1 asked all the witnesses at the deposition about the
2 disciplinary procedures and everyone agreed that discipline
3 should be incremental, that it should be -- if somebody says
4 you did something wrong you should be told what it is, you
5 should be given a chance to defend yourself. They all agree
6 that that procedure was not followed in this case, that they
7 went -- most of the discipline is usually administered by the
8 principal. In this case they brought it to the executive
9 director who made the decision, not the regular course, and I
10 think it's very important to also mention that just -- I think
11 it was two or three days before the expulsion they had a big
12 meeting with the parents and the principal to figure out what
13 to do with this girl.

14 There's no question she was academically challenged
15 and she was not doing well in school and it was very -- it was
16 a very tough time for her and the school needed to figure out
17 what would be a good attainable program academically that she
18 could be in, what special help, what classes, which regents
19 she would take, what she wouldn't take, and they had a big
20 productive meeting and made a plan to go forward.

21 Two or three years later they get this call and --

22 MR. RUTHERFORD: Which is [inaudible].

23 MR. TOLCHIN: Anything she did in the past is all
24 consumed in that [inaudible] meeting. It was [inaudible] that
25 meeting.

1 MR. RUTHERFORD: Your Honor, I couldn't hear what he
2 said.

3 MR. TOLCHIN: The call, the call that this mother of
4 the boy who allegedly was called by another boy and maybe
5 someone else that she sent this picture that telephone number
6 that the call was made on was not documented or anything like
7 that. We don't know who the person is. We don't know what
8 their telephone number is. So --

9 MR. RUTHERFORD: Right. Which is why I'm trying to
10 go from [inaudible]. Like I said, the easiest way would have
11 been to have the phone and so I don't have that and I'm trying
12 to --

13 THE COURT: No, that's not --

14 MR. TOLCHIN: Not her phone. I'm talking about the
15 phone to the -- [inaudible] the school.

16 MR. RUTHERFORD: I understand. And I'm told --
17 believe me, I've tried this with my own client and can't -- I
18 can't figure out who called.

19 THE COURT: Have they -- Mr. Tolchin, have you asked
20 for their phone records?

21 MR. TOLCHIN: I did not ask for their phone records
22 but I asked at their deposition if they had gone back and
23 looked and everyone denied it. And the principal who took the
24 call allegedly testified that she was doodling during the call
25 and she saw the number in the caller ID but she didn't write

1 it down.

2 THE COURT: Okay. Mr. Rutherford, if we get these
3 phone records and it -- and you look at them and it shows no
4 calls to boy -- no texts to boys, then what happens?

5 MR. RUTHERFORD: Well then, I don't have -- I mean,
6 what I would have then if it showed that, I could run down a
7 picture, I've got the claimant lying under oath, and that's a
8 big powerful piece of evidence.

9 THE COURT: Well, I --

10 MR. RUTHERFORD: We know that --

11 THE COURT: -- you're going to get the picture --
12 how are you going to get the picture from a telephone record?

13 MR. RUTHERFORD: Well, then I've got to find -- then
14 I've got to speak to whoever has got -- whoever made the call
15 or has the text and -- you know, knowing boys, it's probably
16 still on somebody's phone. That's why you don't send these
17 things. I may actually be able to find an actual picture.

18 THE COURT: And if you can't -- and if you can't
19 then --

20 MR. RUTHERFORD: Well, if I can't, then I have to --
21 then it all comes down to the credibility of the principal
22 because the principal deemed this a credible call and in the
23 Orthodox community, the sending of a naked picture -- I mean,
24 that's like black -- that's an easy suspension or expulsion.
25 That is so beyond the pale of what this school expects from

1 people and what I've just read to you before that I'm okay
2 with arguing that but my case will certainly be a lot stronger
3 if I've got the plaintiff lying under oath.

4 And, again, this is discovery which is broad and I'm
5 seeking -- now I'm orally modifying what I sought in the -- my
6 office sought in the interrogatories which was too broad, 2012
7 to 2015 --

8 THE COURT: Is Mr. Kinsick [Ph.] still working for
9 you?

10 MR. RUTHERFORD: Yes.

11 THE COURT: You should talk to him about that.

12 MR. RUTHERFORD: Yeah. It should have said '13.
13 2012 to November of 2013. I don't need the records beyond
14 when she was --

15 THE COURT: I know. I don't know where -- why
16 November and why 2012. We're --

17 MR. RUTHERFORD: Well --

18 THE COURT: You want the year before the incident.

19 MR. RUTHERFORD: Yeah. I'm seeking to be
20 reasonable. I'm only seeking the year before the incident.
21 It's not like I want records forever for some nefarious
22 purpose. I just want -- I mean, I've stated why I want them.

23 MR. TOLCHIN: Judge, can I respond to some of this?

24 THE COURT: And -- yeah, you can, you can. And you
25 want telephone calls or text records?

1 MR. RUTHERFORD: I want the phone records. If you
2 want to limit it to texts, that's fine.

3 THE COURT: All right. Mr. Tolchin, go ahead.

4 MR. TOLCHIN: First thing, what counsel is asking
5 for is an unbelievable intrusion into somebody's private
6 space. I'm astonished that it's being made without any good
7 faith showing of two things. The first thing is what actually
8 happened [inaudible] from their own phone records. Have they
9 contacted their phone company and gotten their call logs? If
10 they have, it hasn't been produced, but even if you tell me
11 that you did, if the call was in the caller ID then it should
12 be on their own phone records.

13 The absence of that actually is -- it occurred to me
14 now is a pre-credibility factor in my opinion.

15 THE COURT: Do we know the day on which this call
16 was made to the school?

17 MR. RUTHERFORD: I'm not sure --

18 THE COURT: Was it that day?

19 MR. TOLCHIN: Yeah, it was the exact day.

20 THE COURT: Okay.

21 MR. TOLCHIN: The call came in at four o'clock in
22 the afternoon. The next morning the parents called in for a
23 meeting and she was expelled and two hours later the principal
24 sent an e-mail to all the parents in the class defaming the
25 plaintiff. So we contend -- we know exactly the day.

1 We have an e-mail from Mrs. Oratz to all the parents
2 saying that G.S. was expelled --

3 THE COURT: We're going to -- that portion of the
4 transcript is --

5 MR. TOLCHIN: Oh, I'm sorry. I didn't realize --

6 THE COURT: -- going to be -- for the court reporter
7 where the name was just mentioned, that is going to be
8 redacted.

9 MR. TOLCHIN: Your Honor, I'm sorry --

10 THE COURT: That's okay, Mr. Tolchin. You're on a
11 roll. Go ahead.

12 MR. TOLCHIN: Oh. So we know the exact date and we
13 even have Mrs. Oratz who testified that it was towards the end
14 of the day. She had gone to Staples to buy envelopes because
15 she had to mail out some high school program applications for
16 kids. So -- and Mrs. Sochaczewski took the call after --

17 THE COURT: All right, good. We know the date.
18 Good. Good. Move on.

19 MR. TOLCHIN: -- [inaudible]. You continue --

20 THE COURT: Why is Mr. Rutherford not entitled to
21 this information?

22 MR. TOLCHIN: I'm sorry?

23 THE COURT: Why is Mr. Rutherford not entitled to
24 your client's text records?

25 MR. TOLCHIN: Well, the question is -- to get back

1 to what Your Honor asked, what are you going to do with the
2 information you get. Mr. Rutherford, I think he says he has
3 some kind of magical way that he's going to look at texts -- a
4 log of text messages on a phone bill and he thinks he can
5 determine which of those texters are boys. And then somehow
6 he's going to figure out who all those boys are and then he's
7 going to contact them and essentially say do you know G.S.,
8 did she send you any dirty pictures, and do you still have
9 them.

10 Now -- and all of this is to bolster what they did
11 without having any of this information. The intrusion into
12 the plaintiff's world and into the plaintiff's privacy even
13 though she is in the plaintiff in a lawsuit, it doesn't give
14 them the right it seems to me to intrude into her phone bill
15 and call up everybody she knows and essentially spread rumors
16 anew in the name of discovery. And they certainly shouldn't
17 be allowed to do that before they've looked in their own
18 records in a convincing way and [inaudible] an explanation if
19 they really got this call which I'm not even --

20 THE COURT: No, the two aren't mutually exclusive,
21 right? I could tell the defendants produce to the plaintiff
22 records and telephone calls received by the school for a two-
23 week period prior to G.S.'s expulsion.

24 MR. TOLCHIN: They're not mutually exclusive
25 although since we know the -- apparently know the exact date,

1 I don't -- I think it's just -- it should be limited to that
2 date but I don't necessarily have a problem --

3 THE COURT: Right.

4 MR. TOLCHIN: -- with that if they have the records.

5 THE COURT: Well, whether they have the records or
6 they're provided.

7 MR. TOLCHIN: Yeah.

8 THE COURT: Right? And then I could say --

9 MR. RUTHERFORD: [Inaudible]

10 THE COURT: Then I would say to the plaintiff sign
11 an authorization for outgoing text messages to -- from G.S.'s
12 telephone and we could figure out the time period. I don't
13 know that a year is appropriate, maybe something shorter but
14 provider, AT&T produce the outgoing text messages. I don't
15 think they would have the content of the --

16 MR. RUTHERFORD: No, they don't [inaudible] --

17 THE COURT: -- maybe they have -- whether there was
18 a file, some other sort of file associated with it but produce
19 that.

20 MR. TOLCHIN: And what are they going to do with it
21 [inaudible] --

22 THE COURT: And then -- well, and then we can say,
23 Mr. Rutherford, before you contact anyone, you believe that
24 you have in the community, you've got ways of figuring out
25 whose number is who.

1 MR. RUTHERFORD: Yeah, well, the first thing --

2 MR. TOLCHIN: Without calling the number.

3 MR. RUTHERFORD: -- and --

4 THE COURT: Without --

5 MR. TOLCHIN: Judge, I don't believe that such a
6 thing exists.

7 MR. RUTHERFORD: Hold it. Can I just speak for a
8 second?

9 THE COURT: Let Mr. Rutherford explain -- let Mr.
10 Rutherford explain how he would propose finding out which of
11 those numbers are associated with individuals so we could then
12 determine -- before contacting the people who own the numbers.

13 MR. RUTHERFORD: Absolutely.

14 THE COURT: Because --

15 MR. RUTHERFORD: The first thing I would do -- I'll
16 tell you exactly what I'll do. The first thing I'd do -- the
17 school has records of everyone in their class, all the people
18 who attend the school. So we can eliminate -- and it's an
19 all-girls school. So we can eliminate through the school's
20 records any girls or any families that have anything to do
21 with the girls school. My guess --

22 MR. TOLCHIN: Judge, if that's so, why didn't they
23 know my client's phone number? Why are they --

24 MR. RUTHERFORD: Can we --

25 THE COURT: Mr. Tolchin, let Mr. Rutherford finish

1 his thought.

2 MR. TOLCHIN: Okay.

3 MR. RUTHERFORD: Just to answer that question,
4 knowing the phone number doesn't give me an authorization. I
5 need an authorization. That's what the demand is.

6 MR. TOLCHIN: But you don't know the number.

7 THE COURT: No, the point is that if you don't know
8 G.S.'s telephone number then you don't know the other girls in
9 the school's telephone number so you can't go down the text
10 lines, you know, and say okay, that's S.V., that's, you know,
11 G.D., that's whatever.

12 MR. RUTHERFORD: I didn't say I couldn't figure that
13 out. What I said was she testified she couldn't remember
14 doing anything like that. I hadn't undertaken a search for a
15 phone number because it doesn't do me any good without an
16 authorization. All I did was make a request for an
17 authorization for the cell phone records. That's a very
18 simple request which I've probably made in 50 cases over the
19 years and never had this type of problem before.

20 But, be that as it may, I believe I can eliminate a
21 huge percentage of those numbers and narrow it down. Then
22 let's say I've narrowed it down to ten numbers. There's a
23 boys school or there's boys schools -- it's a closed-knit
24 community; maybe some people can recognize the number. I have
25 no interest, trust me -- first of all, they don't trust people

1 who call randomly so I have no interest in randomly trying to
2 call people and somehow besmirch her reputation. I think I'm
3 going to be able to narrow it down to two or three people.
4 That's my hope.

5 MR. TOLCHIN: So, Your Honor, here's what I'm
6 hearing. I'm hearing that he has no real way to look these
7 up. There's no directory --

8 MR. RUTHERFORD: No, I can do that too.

9 MR. TOLCHIN: He is guess -- I gave him a challenge.
10 I gave him three numbers and said tell me whose numbers these
11 are. He didn't take me up on that.

12 MR. RUTHERFORD: Well, I don't work for Mr. Tolchin
13 and I don't take --

14 MR. TOLCHIN: Right. If you want proofs, challenge
15 it --

16 MR. RUTHERFORD: I don't have to prove anything --

17 MR. TOLCHIN: Your Honor --

18 THE COURT: Gentlemen, gentlemen. Gentlemen,
19 gentlemen, gentlemen. Gentlemen, stop talking -- just stop
20 talking for a second. Just stop talking for a second. This
21 is not personal so you both need to step back.

22 I've got the growing sense from dealing with this
23 case from the outset that there -- you know, the lawyers are
24 getting issues with each other, you know, so let's just cut it
25 out. It's so draining dealing with it. Let's figure out how

1 to get to the bottom of this and save our clients money and
2 time and get to the merits.

3 MR. RUTHERFORD: Sure.

4 THE COURT: And someone is going to -- at the end of
5 the day, someone is going to be incredibly unhappy with the
6 outcome unless you settle the case. All right. So, you
7 know -- so -- all right. So you will take this list of texts
8 and then you will --

9 MR. RUTHERFORD: I will narrow it down --

10 THE COURT: Also --

11 MR. RUTHERFORD: -- to find people and then we'll
12 try and trace whatever numbers I can trace. I don't want to
13 trace -- let's say there's 50 numbers. I don't want to trace
14 50 numbers. What I can eliminate very easily from school
15 records I will do that. Then I will trace the numbers that --
16 the few numbers I have and if I can't figure that out by
17 trace, I'm guessing there's only going to be two or three
18 numbers, I'll have to call them again.

19 THE COURT: How can you do this without your clients
20 looking at the list? Because I'll be very blunt, I don't
21 trust them. And here's why I don't trust them. Because they
22 relied on an anonymous tip without following it up. They shot
23 from the hip. I have no doubt that they'll shoot from the hip
24 again; if they see a list of numbers, they'll start calling
25 it. They'll go rogue.

1 MR. RUTHERFORD: Well, if you want --

2 THE COURT: And that's not happening.

3 MR. RUTHERFORD: Okay. If Your Honor wants --

4 THE COURT: How can you [inaudible] client seeing
5 the list?

6 MR. RUTHERFORD: Okay. If Your Honor wants us to do
7 that, I can do that. We'll start with the class that she was
8 in. We'll ask -- we'll go over to the school. They must have
9 a record of all the parents and, you know, fill out the forms
10 where they give everybody numbers and if you want an attorney
11 to do it from my firm, I'm happy to do that. I just want to
12 move on and get this case to the end of discovery.

13 THE COURT: All right. I want -- I want -- it is
14 certainly attorney's eyes only.

15 MR. RUTHERFORD: Okay.

16 THE COURT: And before you call anyone on that list
17 that you identify as a possible recipient of --

18 MR. RUTHERFORD: Text.

19 THE COURT: -- a text with -- well, it's more than a
20 text. It's kind --

21 MR. RUTHERFORD: A text picture.

22 THE COURT: -- got to be the naked picture --

23 MR. RUTHERFORD: Right.

24 THE COURT: -- partially clothed, whatever. You
25 have to establish to me for my -- for me that that is a likely

1 suspect.

2 MR. RUTHERFORD: Fair enough.

3 THE COURT: You know, this is Joe Smith. The
4 records say he got a text from G.S. with an attached file.
5 And I'd like to check to see if this is the deal.

6 MR. RUTHERFORD: Fair enough.

7 THE COURT: All right? I'm also -- so plaintiff
8 will sign an authorization for that number Mr. Tolchin
9 indicated, AT&T. I'm going to give you six months, six months
10 prior to the incident.

11 MR. RUTHERFORD: Well, here's my only concern with
12 that, Your Honor. If the testimony is that he got it from
13 somebody else and that's why we asked for a year, can we go
14 with nine months as a compromise?

15 MR. TOLCHIN: The testimony, Your Honor, was that
16 the boy said that his -- that the mother said that the boy
17 said that this was G.S., Lev Bais Yaakov, tenth grade. That
18 was the claim. So this was December --

19 THE COURT: And the picture was on the boy's cell
20 phone. And the mother deleted it because the father is a
21 lawyer and said that that's child porn.

22 MR. TOLCHIN: Correct. Correct. Allegedly.

23 THE COURT: All right. Fine, I'll give you nine
24 months.

25 MR. TOLCHIN: Okay.

1 THE COURT: But as a quid pro quo because discovery
2 is a two-way street, the school is going to sign an
3 authorization for its telephone provider, you know, whoever it
4 is, for all calls placed to the school.

5 Now, I was going to say two weeks but Mr. Tolchin,
6 tell me about this. They had a meeting about her academic
7 issues when?

8 MR. TOLCHIN: Just a couple of days before.

9 THE COURT: The expulsion. Okay.

10 MR. RUTHERFORD: But there's no window. I mean, if
11 this happened --

12 MR. TOLCHIN: We know the day it happened on.

13 MR. RUTHERFORD: We know the date and time. We know
14 the date and within an hour of the time.

15 MR. TOLCHIN: So why shouldn't the authorization be
16 any broader than that?

17 THE COURT: Well, because people's memories are --
18 --

19 MR. TOLCHIN: No, because it's not really a memory
20 issue because they -- the family was called in the very next
21 morning. We know that --

22 THE COURT: Right.

23 MR. TOLCHIN: -- and we know the date that the
24 family was there. It's not a matter of memory. Everybody
25 agrees on the date.

1 THE COURT: I'll give you a week. I understand --
2 you know, everybody may agree that when the family was called
3 in and all that but the person who got the call made the
4 mistake; it might have been not the day before but two days
5 before and for whatever reason --

6 MR. RUTHERFORD: Then it would have been a weekend.

7 MR. TOLCHIN: Yeah. It was on a Monday. It doesn't
8 make any sense that it's anything but that day, Your Honor.

9 THE COURT: Fine. Do it a week. Attorney's eyes
10 only, Mr. Tolchin. You'll look at it, and you -- I don't know
11 what you can do with that but --

12 MR. TOLCHIN: I don't know.

13 THE COURT: I mean --

14 MR. RUTHERFORD: -- [inaudible] there was no phone
15 records.

16 THE COURT: Maybe they didn't get any calls.

17 MR. RUTHERFORD: I was always taught not to ask a
18 question if you don't know the answer.

19 THE COURT: Well, even if there's a record -- let's
20 say ten people call the day -- on that Monday or three people
21 called after four p.m. which was when the call happened,
22 right? So you've got a record of that. If you didn't have
23 the records, you still have the testimony of the principal who
24 got the call, right?

25 MR. TOLCHIN: Uh-huh.

1 MR. RUTHERFORD: Well, they would have to come to
2 court, for what it's worth. Not for the truth of the matter
3 asserted but for the fact that she got a call.

4 THE COURT: But if you -- let's say there are no
5 calls after four o'clock. Let's say there are none. You say
6 you got a call, look [inaudible]. You're a dirty liar. You
7 cooked this whole thing up to get her out of the school. It
8 can go one way or the other, right?

9 MR. RUTHERFORD: What we won't eliminate is the very
10 real possibility which is frankly what I believe happened that
11 somebody pranked the school. Somebody pranked the school --

12 THE COURT: Well, then --

13 MR. RUTHERFORD: -- and pranked the girl.

14 THE COURT: If somebody pranked the school then
15 there may be a third-party liability here. If that -- or
16 well, whether somebody pranked the school or a kid got caught
17 with something and placed the blame elsewhere, right?

18 MR. RUTHERFORD: Yep.

19 THE COURT: But if that's the case that's not the
20 school's fault, right? I mean, the school can be faulted for
21 not following up and not -- you know, on an anonymous call
22 taking the drastic measure of expelling someone. Even with --

23 MR. TOLCHIN: Your Honor --

24 THE COURT: -- [inaudible]. That's -- you know --

25 MR. TOLCHIN: The same handbook, the same handbook

1 that Mr. Rutherford quoted from also says that everyone who
2 goes to this school agrees with umshtemik values. Umshtemik
3 values means the religious outlook values of the school, and I
4 asked the people from the school what were those umshtemik
5 values of the school, one of them was guarding your top [sic],
6 that means don't gossip, and they all agree about the Jewish
7 rule about not gossiping also includes not listening to gossip
8 and not believing gossip that you hear about other people.
9 All they've given people the benefit of the doubt. That's one
10 of their foundational principles. Yet this anonymous call
11 from an anonymous person with a secondhand story from a boy,
12 that they believe right away, you're out of school the next
13 morning, and Mr. Rutherford complains that my client got a new
14 phone and doesn't have her old phone. Why didn't they look at
15 her phone to call the family the next morning, tell the girl
16 show me your phone right then and there.

17 THE COURT: All right.

18 MR. TOLCHIN: They didn't ask, and now Mr.
19 Rutherford wants to say that two years later, he can look back
20 in the phone and find the picture -- a text message from --

21 THE COURT: Okay.

22 MR. TOLCHIN: -- two years ago. Come on.

23 THE COURT: I hear what you're saying, Mr. Tolchin,
24 and you may be right at the end of the day but I have a 2:30
25 telephone conference that's waiting and I have a three o'clock

1 after that so I'm all backed up. I want you each to give the
2 authorizations to your adversaries and subpoena the records
3 and go forward as I indicated. Mr. Rutherford, before you --
4 it's -- all of this is attorney's eyes only. Before you call
5 anyone, take any action, you know, double back with me and
6 we'll figure out how best to go forward --

7 MR. RUTHERFORD: Your Honor, doesn't that --

8 MR. TOLCHIN: Your Honor, logistically, do I have --
9 do we have to do this by giving an authorization or it would
10 be it -- if I --

11 THE COURT: I don't care. I don't care.

12 MR. RUTHERFORD: I want an authorization.

13 MR. TOLCHIN: No, maybe if I get -- if I get a
14 printout from AT&T --

15 MR. RUTHERFORD: No, I want an authorization and the
16 second point is I am prohibited from making any calls without
17 checking with Your Honor. I would like the same to be applied
18 to Mr. Tolchin, not making any calls without checking with
19 Your Honor.

20 THE COURT: Two-way street.

21 MR. TOLCHIN: Fine.

22 THE COURT: All right. Look, Mr. Tolchin, if Mr.
23 Rutherford insists on an authorization and subpoenaing the
24 records, you know, indicates to me he doesn't trust you or
25 your client so that's fine, you know.

1 MR. TOLCHIN: I just thought it would be more
2 expeditious.

3 THE COURT: Well, you know, perhaps it would be but,
4 you know, he is well within his rights to ask for it and, you
5 know, to -- what is the famous saying from President Reagan
6 "Trust but verify." Who's to verify.

7 MR. TOLCHIN: That's fine.

8 MR. RUTHERFORD: I think President Reagan it was
9 contra what, who.

10 THE COURT: But, look, gentlemen, I'm going to bring
11 this back in two minutes if that. This case needs to be
12 resolved. It's going to end up in a very difficult place for
13 someone, and there's no way we can resolve this?

14 MR. RUTHERFORD: I'm always open to that. I have
15 a -- frankly a demand that has shocks the conscience. So --
16 but I'm always willing to talk and despite the fact that, you
17 know, we argue in front of Your Honor, I actually think we get
18 along pretty well and the issues are not -- what we have
19 disputes on are actually very few.

20 MR. TOLCHIN: I will tell Your Honor that I have
21 never heard and I'm sure Your Honor has never heard of a
22 defendant who thought that a plaintiff's demand, at least his
23 opening demand didn't shock the conscience. I also have no
24 problems getting along with Mr. Rutherford. The same can't be
25 said about Mr. Kinsick but that's a different story.

1 THE COURT: All right. Well, maybe with my -- maybe
2 I'm projecting with Mr. Rutherford issues that you hadn't with
3 Mr. Kinsick but look, keep it civil, work together, and if you
4 need my help settling the case, I'm here but you've got to
5 make some movement. You've got to get somewhat close because
6 I'm not a miracle worker.

7 MR. RUTHERFORD: Thank you, Your Honor.

8 THE COURT: All right. I will speak to you whenever
9 we're set to have another conference but make sure that you
10 get --

11 MR. TOLCHIN: It's like in ten days, isn't it? is it
12 ten days?

13 THE COURT: Is it ten days?

14 MR. TOLCHIN: It's in early February.

15 MR. RUTHERFORD: Yeah, it's in February. I can give
16 you the exact date if you want.

17 THE COURT: Why don't you look at the schedule and
18 see if you need to adjust it --

19 MR. RUTHERFORD: We're to be in front of Your Honor
20 on the 9th.

21 THE COURT: No, that doesn't make sense.

22 MR. RUTHERFORD: No.

23 MR. TOLCHIN: Judge, I mean --

24 THE COURT: I mean, if that's the date but I don't
25 see why we should meet if you still have these issues and

1 you've got to get information.

2 MR. TOLCHIN: Correct.

3 THE COURT: All right. So why don't you -- I really
4 don't want to get into what else remains to be done but why
5 don't you talk to each other and figure out what needs to be
6 done and how to adjust the schedule.

7 MR. TOLCHIN: We will.

8 THE COURT: And send me a letter --

9 MR. RUTHERFORD: And all of -- there's no
10 outstanding issues other than this.

11 MR. TOLCHIN: Well, why don't we talk, Robert, and
12 we'll -- I know the Magistrate has two calls he's got to go to
13 so --

14 MR. RUTHERFORD: Right. We have -- we reached their
15 discovery end dates and there's no open issues, nothing else
16 is teed up. As far as I'm concerned, discovery is over other
17 than this.

18 MR. TOLCHIN: Like I said, we'll meet and confer and
19 get back to Your Honor.

20 THE COURT: Meet and confer. I'd like a status
21 report by Thursday --

22 MR. TOLCHIN: Which day?

23 THE COURT: -- telling me what remains to be done and
24 we'll adjourn the February 9th conference and I'll see a
25 status report on Thursday, the 4th. All right. Yeah.

1 MR. TOLCHIN: Correct.

2 THE COURT: And I'll figure out where we go from
3 there.

4 MR. RUTHERFORD: Thank you, Your Honor.

5 THE COURT: Thank you, gentlemen.

6 MR. TOLCHIN: All right. Bye. Thank you.

7 (Proceedings concluded at 2:55 p.m.)

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1 I, Shari Riemer, certify that the foregoing is a true and
2 correct transcript from an electronic sound recording of the
3 proceedings in the above-entitled matter and that the
4 transcript page format is in conformance with the regulations
5 of the Judicial Conference of the United States.

6
7 Dated this 3rd day of May, 2016

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11 _____
12 Shari Riemer
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